The Unbearable Illegitimacy of American Law

by Stephen B. Presser

Law, Pragmatism, and Democracy
by Richard A. Posner
Cambridge: Harvard University Press; 416 pp., $35.00

American Law in the Twentieth Century
by Lawrence M. Friedman
New Haven: Yale University Press; 722 pp., $35.00

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For some time now, American law and lawyers have had a legitimacy problem. Most Americans must wonder how it is that unelected federal judges have the power to declare that no state government can punish consensual homosexual relations, prohibit abortion, or permit prayer in the schools (to mention just a few of the striking things the federal courts have done in the past few decades). Nothing in the Constitution or federal law clearly requires these holdings, and all of the laws struck down by federal courts were well-established legal practices for generations. From at least as early as 1786, some Americans have wondered whether we really need so many lawyers. In that year, Benjamin Austin, a Boston merchant who thought American lawyers woefully ignorant of commercial needs, declared that they were not a necessary "order" in a republic; yet, two centuries later, we had approximately one million members of that order (giving us, probably, a higher percentage of lawyers *per capita* than any other nation in history).

Two interesting volumes address these and other puzzles of our current legal establishment. In *Law, Pragmatism, and Democracy*, the Hon. Richard Posner (U.S. circuit judge for the Court of Appeals for the Seventh Circuit), easily the most prolific federal judge who ever lived (he has published more than 40 books), explains why he believes it makes sense to give judges wide-ranging discretion, unrestrained by many legal niceties. Prof. Lawrence Friedman, the Marion Rice Kirkwood Professor of Law at Stanford and the country's preeminent legal historian, argues in *American Law in the Twentieth Century* that our legal system is simply a reflection of our culture. Both books are engagingly well written, both authors are breathtakingly knowledgeable—and neither seems particularly disturbed by the fact that law, as the courts now interpret it, is not what it once was. It used to be the proud boast of the Framers (John Adams in particular) that ours was a government of laws, not men—meaning that the law, instead of representing arbitrary preference, contained timeless values; that law was a source and a protector of morality; and that the law's moral base rested on a religious foundation. Not any more, apparently.

Richard Posner, in this thoughtful, if ultimately alarming, work, takes the position that American law is not now and probably never was as deep as some claimed. He makes his principal mission "simply to make the case for contemporary American democracy." This "democracy," in his view, requires a legal system that is not committed to anything other than preserving a plurality of options; judging in such a system, Posner argues, involves a pragmatic, case-by-case approach that rejects "conceptualisms" such as "moral, legal, and political theory when offered to guide legal and other official decisionmaking." Posner's America is a place featuring "Certain characteristics . . . first noted in a systematic way by Tocqueville but already epitomized in the career and attitudes of Benjamin Franklin—primarily the commercial values that have, since almost the beginning, largely defined American society." These values, he believes,

> discourage reflection and abstract thought, neither of which has a commercial payoff, and encourage the bracketing of deep issues because they tend to disrupt and even poison commercial relations among strangers.

What American judges ought to try to do, and what the best of them (such as Oliver Wendell Holmes, Jr., and John Marshall, Posner's avatars in this volume) did, is to eschew anything other than a pragmatic approach that allows them to "accept the irreducible plurality of goals and preferences within a morally heterogeneous society such as that of the United States, and proceed from there." Posner believes (as Holmes did) that the job of judges is essentially legislative, although, like Holmes, he is prepared to defer to executives or legislatures when it makes pragmatic sense to do so in the effort to preserve and further American pluralism. Posner is even willing to concede that the idea of the rule of law is useful—in moderation. "The formalist attributes encompassed by the concept of the rule of law," he concedes, "have great social value, but in present circumstances only as elements of an overall approach to law that is pragmatic."

It is easy (and tempting) to suggest that all of this amounts to an elaborate justification for Posner's own style of judging, which can often seem idiosyncratic, if not arbitrary, to readers of his books as well as to litigants who appear before him. What Posner attributes to "American democracy"—and to American society—is a desire for the kind of individual liberty and unwillingness to promulgate a creed that lies behind so many federal-court decisions that have rejected state legislation and state practices based on religious or moral notions. This may seem like an elevation of the judge's personal preference over the established law (and it is), but Posner does manage tolerably well to argue that what he does has been done by many other American judges. He justifies and supports this approach through his embrace of the principles of Hans Kelson's positivism, Joseph Schumpeter's concept of "elite democracy" (in which elites compete for the favor of the people), and the rejection of the naive "deliberative democracy" (in which public policy is hashed out through extended discussion) of John Dewey and the "rule of law"-based formalism of Friedrich Hayek.

Posner may really believe that our law has no interest for "deep thinkers." Paradoxically, however, his book clarifies what these philosophers were up to; while American lawyers, whom Posner properly understands as almost completely unreflective, might gain much from reading this and other studies of Kelson, Schumpeter, Dewey, and Hayek—and many other minor figures in law and philosophy—if only to secure some idea of what is now missing from our juridical thought.

Like Posner, Lawrence Friedman is a gifted prose swordsman. The American public, he tells us, "by and large, is inert—busy with its own affairs or, after the dawn of the glorious age of television, sitting with a six-pack in front of the flickering screen." Condemning "race preju-

dice" on the West Coast in the late 1800's and early 1900's, he writes that "It carried with it strong overtones of economic rivalry, sexual paranoia, and the usual vague fears of dark, unmentionable evils that might destroy (as it were) America's precious bodily fluids." Of the WPA artists, Friedman says that, "In all honesty, most of them fall pretty far short of the standards set, say, for Florence or Siena in the days of the Medicis." He describes William Howard Taft as "a strong, conservative force on the Court, as well as by far the fattest person ever to serve as Chief Justice." Rather than restricting himself to a few judicial decisions and jurists as Posner does, Friedman takes for his subject the whole sweep of 20th-century law. Posner is good reading for legal scholars and a few sophisticated lawyers, but Friedman can profitably be tackled and enjoyed by anyone curious about our current legal conundrums.

To a certain extent, Friedman's theme is the same as Posner's: The genius of American law is its pluralism, or what Friedman occasionally calls "plural equality." The result of current law and culture, Friedman argues, is to produce "a different America, a more plural America [than we had in the 19th century], an America made up of a rainbow of cultures and colors and norms." Friedman covers nearly every topic encountered in three years of law study and a decade or two at the bar, including (but not limited to) contracts, civil procedure, torts, property, corporations, constitutional law, criminal law, landlord-tenant law, environmental law, evidence, trial practice, federal jurisdiction, administrative law, labor law, bankruptcy, banking, insurance, antitrust, local-government law, food-and-drug law, family law, international public and private law, immigration law, tax law, and the law of securities regulation. His main themes are the rise of the welfare-regulatory state; the rise of courts as policy-makers; the shift of power to the federal government; and the "law explosion" (the current tendency to litigate and regulate everything). If Posner tends toward the arcane, Friedman has a gift for simplifying esoteric doctrine and demonstrating how virtually all 20th-century developments can be understood simply as reflections of trends in American culture. Friedman has no need of Kelson, Schumpeter, Dewey, or Hayek: Usually, he regards the law as something more or less devoid of content, except insofar as it mirrors trends in the broader society.

And here, really, is Friedman's argument: There is little to differentiate American life and law. For him, the latter simply reflects the former. If the federal courts have rewritten state and federal law, that is because this is what Americans want. "The main theme of this book," he tells us, "is that law is a product of society." As he puts it in an arresting mixed metaphor, "[Legal and constitutional] doctrines do not grow on trees; they feed on the meat and drink of social approval."

Thus, Friedman explains America's current litigiousness and obsession with "rights" by observing that "the essence of late-twentieth-century culture" was "a general right to know, to choose, to act independent of authority." "[I]n the end," he tells us, "one has to fall back on a strain in American legal culture which supports (for some of us, at least) the idea of suing the daylights out of those we blame for our misfortunes." If we have much more law and many more lawyers than we used to, and if the modern legal system seems unwieldy, untraditional, and incoherent, that is because, in Professor Friedman's late-20th-century America,

> There is no such thing as objective truth. There is white truth and black truth and Asian truth and Hispanic truth. There is male truth and female truth. Probably there is young truth and old truth, and rich truth and poor truth, too.

But is Friedman's truth "true"? Is American law really nothing but what a few elite judges think the American public needs? Is it a reflection of "interest group" plurality, the desire for "individual fulfillment," personal satisfaction, and personal growth or "the master change in the general culture in the twentieth century: the triumph of the individual, the exaltation of the self," as Friedman maintains? Is there no hope for a return to what law once was?

The profession of law once was a calling, in the practice of which one did not work simply to further the needs of individual selfish clients or interest groups; and a lawyer—an "officer of the court"—understood his responsibility to maintain and pass on the traditional mores of the community. A lawyer was not a mere technician or even a sophisticated social scientist, employing economic models to further the needs of a market economy. A lawyer was a man of letters who understood that American law was a reminder to Americans that there are higher goods than self-gratification; that the law and the Constitution were intended to preserve the assumption that, as American republicans, we had duties to one another, to our country, and to God; in short, that ours was to be a Christian republic and a light unto the nations. Posner leaves room for some people (and maybe even a few judges) to continue to believe that; Professor Friedman, however, provides none at all. Rather, he states explicitly his belief that "There is, to be honest, no way to turn back the clock."

And yet, not all change in American law has proved permanent. We have trimmed back the frankly redistributive and confiscatory taxes of the Roosevelt era, the estate tax may be doomed, and the Rehnquist Court has manifested a healthy desire to set some limits on the reach of Congress's power and to preserve—admittedly to a limited extent—the sovereignty of the states. In the mid-80's, when Critical Legal Studies, a cheerfully radical and essentially socialist ideology, was sweeping the law schools, it swaggered with confidence in itself as the wave of the future—only to collapse when the Berlin Wall fell in 1989. Friedman fails to mention in his book the Federalist Society, a loosely knit group of Burkeans and free-market classical liberals that is also the fastest-growing lawyer and law-student association today. Their program, consistent with the efforts of the Rehnquist Court, is to breathe new life into the Tenth Amendment; to remind us that the powers not granted to the federal leviathan are reserved to the states and the people; and to suggest that it is inconsistent with the Constitution for us to be governed by unelected law lords. At the law schools at Pepperdine (in Malibu, California) and Ave Maria (in Ann Arbor), at Catholic University in Washington, D.C., at Notre Dame, and in other sheltered spots in the legal academy, some law professors still labor, in the manner of the monks of Iona, self-consciously to preserve and protect the original design of our Constitution. Though there is much is to be learned from Posner and Friedman, salvation lies elsewhere.

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Voyage to Albion

by Derek Turner

Albion: The Origins of the English Imagination
by Peter Ackroyd
Chatto & Windus; 516 pp., £25

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Englishness may be coming back into fashion. After the union of the English and Scottish crowns and the foundation of modern Britain in 1603, the idea of Englishness was increasingly submerged in, and confused with, the idea of Britishness. It now looks as if the English may be becoming self-conscious again. Three centuries of outward-looking expansionism are being succeeded by a new mood of introspection.

The empire has gone, leaving only the purposeless Commonwealth. Scottish and Welsh devolution has left behind the running sore of the "West Lothian Question." This partial evisceration is to be followed—if the government has its way—by the division of England into regional assemblies that would not only obviate the need for England's traditional parish and county councils but undermine the whole concept of England as a unitary territory. As well as losing powers to the devolved parliaments and (soon) the regional assemblies, Britain's parliament at Westminster has also handed over many of its prerogatives to Brussels, with a corresponding loss of prestige. Since 1948, large-scale immigration (almost all of it to England) has been taking place, and the idea of being British has been diluted so much that it is increasingly meaningless. When viewed in conjunction with the above phenomena, the fact that the tercentenary of the union of the crowns passed almost without official or public notice suggests that the Great Britain "brand" is on the wane. Increasingly, Great Britain is no longer a land but just an island—no longer a home, just a house.

Small wonder, then, that some of England's cleverest sons and daughters should have once again begun to wonder what it is to be English, despite official disapproval. Labour's attitude was well summed up by Jack Straw several years ago, when he opined that the English had long been an especially violent and lawless people and that English nationalism therefore needed to be repressed (a perspective shared by the Conservative leader at the time, who spoke about how "dangerous" English nationalism was, or could be).

Part of this official disapproval may be attributed to the widespread belief that nationalism is no longer "relevant." More may be an expression of the bruised vanity of the political class, which does not like the wounding inference that many people do not actually like the country that politicians have created and fostered. It is also likely that they do not relish the prospect of being sidelined in a political future that they will not be able to control. But essentially, they believe their own dark propaganda and really do think that Englishness equals evil. As always, the "official" view is somewhat out of kilter with the views of many, perhaps most, ordinary people. While they look upon English self-consciousness as a kind of xenophobia, surely it is the English political class's own "synophobia" that is the really interesting psychological problem.

An embarrassing silence had grown up around the whole concept of being English. Enter Peter Ackroyd, who, like an English Luigi Barzini, has come to fix the intellectual underpinnings for a newly resurgent Englishness—albeit an Englishness born of fear rather than hope, a necessary defensive measure rather than a bold assertion. (As Ackroyd notes in another, more specific context, "A sense of mortality, or of dwindling numbers, may . . . encourage a sense of identity, threatened or otherwise.") For such an influential writer as Peter Ackroyd to write a book like *Albion* is hugely significant of the changing mood in England. English nationalism may be just about to become middle class—*ergo*, respectable.

Ackroyd has long concerned himself with English faces and places. As well as his voluminous journalism, and his outstanding *London: The Biography*, he has written biographies of Dickens, T.S. Eliot, Thomas More, and William Blake. Characters in his award-winning novels have included architect Nicholas Hawksmoor (whom he memorably cast as a murderous mystic who erected his buildings according to cabalistic lore), Oscar Wilde, John Milton, William Hogarth, William Byrd, and Tobias Smollett, among many others. Despite an element of camp in some of his writings, his is an original and authoritative voice. Now, he has put all of his vast reading, his literary training, and his superlative writing skills ("the language that speaks of decay falls back into its original patterns, like the countenances of those about to die") to use in a quixotic attempt to rescue Englishness from extinction.

Albion is full of glittering gems of lore and tradition, and gossamer-seeming intimations that, when examined, turn out be stronger than they first appear—spider silk rather than cotton thread. Even when Ackroyd is being fanciful, he is pleasing and provocative: "It may be that those who live upon a small island take a delight in small things," he says, to launch a discussion on the art of the miniature, a distinctively English form. This is admittedly a forced *apercu*, but it is certainly arguable. Rather more forced is

> This desire to miniaturise obsessions . . . could . . . possibly be related to the pattern of English detective stories in the twentieth century, when evil and murderous wickedness were seen to operate in small and cosy country villages.

There must be a unique sensibility within a nation that has maintained her original borders over so many centuries and which, until recently, had endured no important immigration since the Normans. Yet, as is so often the case when describing alleged national traits, Englishness is easier to recognize than to define.

In *Albion*, as with all group studies, there are innumerable gray areas and problems of categorization, as individuals' characteristics move in and out of focus *vis-à-vis* corporate characteristics, and the group gradates into other groups. How does one define Englishness, so as to make it simultaneously flexible enough to allow evolution and rigid enough to have meaning? To make definitions still more difficult, Ackroyd claims that the "mixing or blurring of forms" is itself characteristic of Englishness. There is also the central paradox, as expressed so perfectly by William Vaughan in his 1999 *British Painting*: "The more local and specific a sensibility, the more it may aspire to universality." As all men share certain characteristics, there are bound to be areas of overlap among narrower national categories and individual exceptions to every racial rule. Ackroyd is aware of the problem: "If there is such a thing as a native cast of thought it can properly be understood only in the context of a broadly European sensibility," while "certain qualities defined here as peculiarly English are not uniquely so."